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No Due Process, No Asylum, and No Accountability: The Dissonance Between Refugee Due Process and International Obligations in the United States

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COMMENTS

NO DUE PROCESS, NO ASYLUM, AND NO ACCOUNTABILITY: THE DISSONANCE BETWEEN REFUGEE DUE PROCESS AND INTERNATIONAL OBLIGATIONS IN THE UNITED STATES

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I. INTRODUCTION

The Syrian refugee crisis has captured the world's attention.¹ There are currently more than 4.8 million displaced Syrian refugees² with limited options for resettlement, as European states begin to close their borders.³ Though the U.S. media has recently taken up the debate of whether refugees should or should not be accepted, it has rarely addressed the questionable denial of asylum claims by the United States under the Material Support Bar.⁴ The Material Support

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1. See generally Jody Heymann & Aleta Sprague, *Do the World's 232 Million Migrants Have Constitutional Rights?*, HUFFINGTON POST (Oct. 23, 2015, 5:42 PM) http://www.huffingtonpost.com/dr-jody-heyman/do-the-worlds-232-million_b_8371062.html. (stating that while the Syrian refugee crisis is currently the center of global media attention, the situation reflects a much broader trend of increasing migration worldwide).

2. See *Syria Regional Refugee Response*, USCIS, <http://data.unhcr.org/syrianrefugees/regional.php> (last visited Aug. 1, 2016) (noting that the 4.8 million displaced Syrian refugees includes 2.1 million Syrians registered by the United Nations High Commissioner for Refugees (UNHCR) in Egypt, Iraq, Jordan, and Lebanon, 2.7 million Syrians registered in Turkey, as well as more than 29,000 Syrian refugees registered in North Africa).

3. Michelle Chen, *European Countries' Closing Their Borders to Refugees is Collective Punishment*, NATION (Nov. 18, 2015), <http://www.thenation.com/article/european-countries-closing-their-borders-to-refugees-is-collective-punishment/> (predicting Hungary as the first of many European states that will close their borders to refugees).

4. See generally Joseph Erbentraut, *How The Media Are Reporting On Europe's Refugee Crisis*, HUFFINGTON POST (Oct. 9, 2015, 12:52 PM)

Bar,⁵ codified in section 212 of the Immigration and Nationality Act (“INA”),⁶ is a ground for inadmissibility to the United States for individuals who have actively supported terrorist groups by providing them material aid.⁷ The Material Support Bar’s statutory language was modified by the Patriot Act in 2001 and the REAL ID Act in 2005;⁸ both acts transformed the statute from a simple ban on material support into an intricate provision, placing a heavy burden on asylum seekers to disprove allegations of terrorism support.⁹ It has been widely acknowledged that the U.S. government is overbroad in its application of the Material Support Bar in asylum proceedings.¹⁰

http://www.huffingtonpost.com/entry/refugee-crisis-media-coverage_5615952ce4b0cf9984d850ec. (describing how the media is reporting wide coverage of the refugee crisis and questioning whether the media is doing a good job highlighting ongoing problems and solutions).

5. Immigration and Nationality Act § 212, codified as 8 U.S.C. § 1182 (2006) [hereinafter INA].

6. *Id.*

7. See generally *Terrorism-Related Inadmissibility Grounds (TRIG)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/laws/terrorism-related-inadmissibility-grounds/terrorism-related-inadmissibility-grounds-trig> (last visited Apr. 11, 2016) (describing the reasons individuals can be denied entry into the United States, including, but not limited to, individuals who engaged in, incited, or endorsed terrorist activity, are representative or members of a terrorist group, receive training from a terrorist organization, etc.).

8. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT Act)*, Pub. L. No. 107-56, 119 Stat. 231 (codified in scattered titles of U.S.C.) [hereinafter PATRIOT Act]; *Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, (REAL ID Act of 2005)*, Pub. L. No. 109-13, 119 Stat. 231 (codified in scattered titles of U.S.C.) [hereinafter REAL ID Act].

9. INA § 212, *supra* note 5 (defining engagement in terrorist activity as an act that the actor knows, or should know, provides material support, including but not limited to, transportation, communications, funds, weapons, or training for the commission of a terrorist activity or a terrorist organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know that the organization was a terrorist organization). See also Courtney Schusheim, *Cruel Distinctions of the I.N.A.’s Material Support Bar*, 11 N.Y. CITY L. REV. 469 (2008) (stating that each legislative act added more undefined terminology and multi-tiered systems). See generally PATRIOT Act, *supra* note 8; REAL ID Act, *supra* note 8.

10. See *World Report 2015: United States*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2015/country-chapters/united-states> (last visited April 11, 2016) (proclaiming that the United States makes use of overly broad

The International Covenant for Civil and Political Rights (ICCPR),¹¹ ratified by the United States in 1992, obligates signatory states to protect and preserve basic human rights, equality before the law, and the right to a fair trial in Article 14.¹² Article 4(1-3) of the ICCPR allows a state to derogate from standard ICCPR obligations during a time of national emergency.¹³

Three days after the terrorist attacks on September 11, 2001, then President George W. Bush declared a state of national emergency for the United States.¹⁴ However, the United States never formally

material support charges and prosecutorial tactics that violate fair trial rights); Jason Dzubow, *Amendments to the Terrorism Bar—or—How Fox News Enables the Holocaust*, ASYLUMIST (Feb. 27, 2014), <http://www.asylumist.com/2014/02/27/amendments-to-the-terrorism-bar-or-how-fox-news-enables-the-holocaust/> (setting forth that, at the end of his presidency, President Bush and his Administration recognized that the terrorism bars contained in the PATRIOT Act and the REAL ID Act were too broad). *See generally* Steven H. Schulman, *Victimized Twice: Asylum Seekers and the Material-Support Bar*, 59 CATH. U. L. REV. 949, 950 (2010) (describing how the overly broad statutory interpretation of the Material Support Bar is a disservice to asylum seekers who are actually terrorism victims); Shirley Llain Arenilla, *Violations to the Principle of Non-Refoulement Under the Asylum Policy of the United States*, 15 ANUARIO MEX. DE DERECHO INTERNACIONAL 283, 296 (2015) (confirming that the United Nations Human Rights Committee (“UNHCR”) and Independent Court of Human Rights (“ICHR”) have both criticized the U.S. asylum process as being inconsistent with international obligations under the 1951 Convention Relating to the Status of Refugees).

11. International Covenant on Civil and Political Rights, Dec. 16 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

12. *See FAQ: The Covenant on Civil & Political Rights (ICCPR)*, ACLU (Apr. 2014), <https://www.aclu.org/faq-covenant-civil-political-rights-iccpr> [hereinafter *FAQ: ICCPR*] (describing the ICCPR as a key international human rights treaty). *See generally* ICCPR, *supra* note 11, art. 14 (guaranteeing that all people are equal before the law and that all people have the right to a fair trial).

13. *See* ICCPR, *supra* note 11, art. 4, § 1-3 (stating that in a time of public emergency, which threatens the life of the nation, party states may derogate from their obligations under the Covenant, only to the extent required by the exigencies of the emergency, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination, and that a state availing itself of derogation must immediately inform the other states through the Secretary-General of the United Nations, of the provisions of the Covenant from which it has derogated and the reasoning for derogating).

14. *See* Declaration of a National Emergency by Reason of Certain Terrorist Attacks, 66 Fed. Reg. 48199 (Sept. 14, 2001) [hereinafter Declaration of a National Emergency] (“Now, Therefore, I, George W. Bush, President of the

notified the United Nations of its declaration and, therefore, did not properly derogate under the Article 4(1) derogation provision.¹⁵

While the United States does have legitimate interests in rejecting asylum applications of individuals who have substantially supported terrorist activity and remain a threat to national security, the convoluted Material Support Bar currently denies due process rights to asylum seekers who pose no threat to national or international security.¹⁶ The United States must comply with the ICCPR standards for due process in its dealing of immigration proceedings for asylum seekers.¹⁷

This Comment will argue that the United States is violating its ICCPR Article 14 obligations under the Article 4(1) derogation provision by not providing due process in its application of the Material Support Bar. Part II of this Comment will lay out the international standards for due process.¹⁸ Part II will also describe the ICCPR, specifically looking at Articles 4 and 14¹⁹ and the framework

United States of America, by virtue of the authority vested in me as President by the Constitution and the laws of the United States, I hereby declare that the national emergency has existed since September 11, 2001 . . .”).

15. See HELEN DUFFY, *THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW* 583 (2d ed. 2015).

16. See *Illusion of Justice: Human Rights Abuses in US Terrorism Prosecutions*, HUM. RTS. WATCH (July 21, 2014), <https://www.hrw.org/report/2014/07/21/illusion-justice/human-rights-abuses-us-terrorism-prosecutions> (stating that governments have a duty under international human rights law to take responsible measures to protect individuals within their jurisdiction from acts of terrorism). *But see* Anwen Hughes, *DENIAL AND DELAY: THE IMPACT OF THE IMMIGRATION LAW’S “TERRORISM BARS” ON ASYLUM SEEKERS AND REFUGEES IN THE UNITED STATES*, HUM. RTS. FIRST 22 (Eleanor Acer ed., 2009), <https://www.humanrightsfirst.org/wp-content/uploads/pdf/RPP-DenialandDelay-FULL-111009-web.pdf> [hereinafter *DENIAL AND DELAY*] (confirming that thousands of refugees who pose no threat to the United States have had their applications for asylum, permanent residence, and family reunification denied or delayed due to overly broad immigration laws).

17. See Brief for the United Nations High Comm’r for Refugees as Amicus Curiae Supporting Petitioner, *Thawng Vung Thang v. Gonzales*, (5th Cir. Feb. 9, 2007) (No. 06-60646) (declaring that the Material Support Bar can and therefore should be interpreted consistently with United States obligations under international law).

18. See discussion, *infra* Part II.A (compiling and comparing the aspects of a fair trial as described in international law and other international treaties).

19. See discussion, *infra* Part II.B (presenting the framework of the ICCPR

of the Material Support Bar.²⁰ Part III of this Comment will analyze how the Material Support Bar is violating Article 14(1),²¹ Article 14(3)(a),²² and Article 14(3)(c)²³ of the ICCPR. Part III of this Comment will also analyze how the United States has not properly derogated under the Article 4(1) derogation provision, because the Material Support Bar is not proportional to the U.S. state of emergency,²⁴ and because the United States did not properly declare its state of emergency.²⁵ Part IV of this Comment will then recommend that the statutory language of the Material Support Bar be more narrowly tailored to target true threats to national security.²⁶ Part IV of this Comment will recommend that an Ombudsperson be implemented to communicate with asylum seekers during the legal process.²⁷ Part IV of this Comment will also recommend the creation and implementation of a stable mechanism for granting duress and group-based waivers to asylum seekers.²⁸ Finally, Part V of this Comment will conclude that the United States is violating Article 14

and U.S. obligations to Article 14 and the prerequisites of the Article 4(1) derogation provision).

20. See discussion, *infra* Part II.C (describing the Material Support Bar's structure and flaws).

21. See discussion, *infra* Part III.A.1 (asserting that Article 14(1) is being violated by overbroad statutory language).

22. See discussion, *infra* Part III.A.2 (asserting that the government is violating Article 14(3)(a) by withholding evidence from asylum seekers).

23. See discussion, *infra* Part III.A.3 (asserting that the government is violating Article 14(3)(c) by leaving asylum seekers unaware of the status of their case for long periods of time).

24. See discussion, *infra* Part III.B.1 (asserting that the Material Support Bar is not proportional to the U.S. state of emergency; therefore, the United States is not abiding by the Article 4(1) derogation provision).

25. See discussion, *infra* Part III.B.2 (asserting that even if the Material Support Bar were proportional to the state of emergency, the United States still failed to properly declare a state of emergency and, therefore, is not a proper derogation under the Article 4(1) derogation provision).

26. See discussion, *infra* Part IV.A (recommending that a narrow tailoring of the statutory language of the Material Support Bar would no longer violate Article 14(1) obligations).

27. See discussion, *infra* Part IV.B (recommending that an Ombudsperson would meet Article 14(3)(a) standards for continued communication between Department of Homeland Security (DHS) and the asylum seeker throughout the Material Support Bar process).

28. See discussion, *infra* Part IV.C (recommending that implementing a new and effective waiver mechanism would meet Article 14(3)(c) obligations).

of the ICCPR under its current application of the Material Support Bar, even under an Article 4(1) derogation.²⁹

II. BACKGROUND

In 1967, the United States ratified the United Nations Protocol Relating to the Status of Refugees,³⁰ and, in 1980, Congress enacted the Refugee Act,³¹ an asylum program that formalized the process for granting asylum to noncitizens in the United States, thereby allowing the U.S. to fulfill its treaty obligations.³² Under the Refugee Act, an asylum seeker must prove that they qualify as a refugee, someone who is unable to or unwilling to avail themselves to the protection of their country of nationality due to persecution or a well-founded fear of persecution on account of race, religion, nationality, membership of a particular social group, or political opinion.³³

Refugees and asylum seekers are entitled to a fair trial under the ICCPR.³⁴ The ICCPR acknowledges the duty of states to ensure equality before their courts for all persons under a state's jurisdiction.³⁵ This section will discuss the general minimum

29. See discussion, *infra* Part V.

30. Protocol Relating to the Status of Refugees, Jan. 31 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Protocol Relating to the Status of Refugees].

31. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified in scattered sections of 8 U.S.C. §§ 1101-1537).

32. See generally Jonathan Raz, *Constitutional Constraints on Asylum Termination by the United States Department of Homeland Security*, 36 CARDOZO L. REV. 1951, 1957 (2015) (noting that the Protocol requires that a refugee be rejected only when pursuant to a decision reached "in accordance with due process of law").

33. See Refugee Act of 1980, *supra* note 31, §201. See also Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (providing the international definition of refugee, upon which the Refugee Act of 1980 is based); Protocol Relating to the Status of Refugees, *supra* note 30, art. 1.

34. See ICCPR, *supra* note 11. See generally 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992) (noting that asylum seekers are not included in the U.S. reservations of its application of the ICCPR, and therefore, the U.S. ICCPR obligations apply to asylum seekers).

35. Cf. James C. Hathaway, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 652 (2005) (identifying the ICCPR as a strong protector of refugee rights).

obligations of a fair trial in international law and provide an overview of the ICCPR. This section will also briefly describe the framework of the Material Support Bar and how it fails to comply with its ICCPR obligations.

A. MINIMUM OBLIGATIONS OF FAIR TRIAL IN INTERNATIONAL LAW

The minimum obligations of a fair trial under international law have been developed in the ICCPR and in other international conventions as well.³⁶ Throughout these conventions, the minimum obligations of fair trial require that the State provide reasonable access to the assistance of legal counsel,³⁷ that the judge shall not conduct himself in a highly respectful manner,³⁸ that all individuals

36. Cf. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810, art. 6-8, (1948), Geneva Convention [No III] Relative To The Treatment Of Prisoners Of War, Aug. 12, 1949, 6 U.S.T. 3316, art. 49-50, 66-75, African Charter on Human and Peoples' Rights (27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 *I.L.M.* 58, art. 3 (1982), American Convention on Human Rights, opened for signature Nov. 22, 1969, art. 8, § 1, 1144 U.N.T.S. 123, 147 (entered into force July 18, 1978), Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 U.N.T.S. 221, arts. 5-7 (entered into force Sept. 3, 1953) (each describing various aspects of a fair trial); see also Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L.J.* 935 (2002) (outlining the elements of a fair trial in the Basic Principles on the Role of Lawyers, the United Nations ("U.N.") Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the American Convention on Human Rights and the Principles, and in Guidelines on Access to Legal Aid in Criminal Justice Systems).

37. See e.g., U.N. General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 17(1) U.N. Doc. A/RES/43/173 (Dec. 9, 1988); American Convention on Human Rights art. 8, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention] (holding that all persons are entitled, with full equality, to the guarantee to be assisted by legal counsel of her own choosing, to communicate freely and privately with her counsel). See also U.N. General Assembly, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 3(20), U.N. Doc. A/67/187 (Dec. 20, 2012) [hereinafter United Nations Principles and Guidelines] (holding that states should ensure that anyone who is detained or arrested is entitled to legal aid at all stages of the criminal process).

38. See e.g., Judicial Group on Strengthening Judicial Integrity, *Bangalore Principles of Judicial Conduct* (Nov. 25-26, 2002), http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf (holding that the behavior of a judge must reaffirm the people's faith in the integrity of the

will be equal before the court,³⁹ and that all individuals shall be entitled to a fair hearing by a competent and impartial court.⁴⁰

Other international bodies hold that the right to a fair trial includes: an independent and impartial judiciary; the right to counsel; the right to present a defense; a presumption of innocence, the right to appeal; the right to an interpreter; protection from ex post facto laws; a public trial and; the right to have charges presented in a timely manner.⁴¹ In the United States, the Supreme Court has long held that these procedural due process rights extend to all aliens on United States' soil, whether she is in the United States lawfully, unlawfully, temporarily, or permanently.⁴²

judiciary).

39. ICCPR, *supra* note 11, art. 14(1); American Convention, *supra* note 37, art. 8(2) (holding that all persons have the right to be presumed innocent until her guilt has not been proven according to law).

40. ICCPR, *supra* note 11, art. 14(1); American Convention, *supra* note 37, art. 8.

41. See Hathaway, *supra* note 36 at 1972-74 (listing the American Convention on Human Rights, the European Convention on Human Rights, and the African Charter on Human Rights as other international conventions which regard the right to a fair trial as a protected human right); U.N. Human Rights Comm., General Comment No. 29: Article 4: Derogations During a State of Emergency, art. 4(6, 19), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) [hereinafter General Comment 29] (clarifying that just because a right is specialized as not being subject to derogation does not mean other rights in the ICCPR should be derogated from in every state of emergency); see generally U.N. Human Rights Comm., Miguel González del Rio v. Peru, U.N. Doc. CCPR/C/46/D/263/1987 (Oct. 19, 1987) (claiming violations of articles 9, 12, 14, 17, and 26 of the ICCPR in relations to an unfair trial).

42. See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (holding that once an individual enters the country, the legal circumstance of whether or not due process applies to them changes because the Due Process Clause applies to all "persons" within the United States, including asylum seekers). See also E. Lea Johnston, *An Administrative "Death Sentence" for Asylum Seekers: Deprivation of Due Process under 8 U.S.C. § 1158(d)(6)'s Frivolousness Standard*, 82 WASH. L. REV. 831, 849 (2007) (indicating that courts have recognized asylum seekers' procedural due process rights under other immigration statutes). But see Marcelle Reneman, *EU ASYLUM PROCEDURES AND THE RIGHT TO AN EFFECTIVE REMEDY* 55 (2014) (stating that the European Convention on Human Rights does not apply to judicial proceedings concerning the entry or deportation of aliens).

B. AN OVERVIEW OF THE ICCPR AND U.S. OBLIGATIONS AS A
SIGNATORY

The ICCPR was ratified by the United States in 1992 and is a part of the International Bill of Human Rights, along with the International Covenant on Economic Social and Cultural Rights and the Universal Declaration of Human Rights.⁴³ Under the due diligence standard of international law, the state owes a duty to protect, respect, and fulfill its human rights obligations to all people within its jurisdiction, and therefore produces an international legal responsibility.⁴⁴

The ICCPR protects civil and political rights, and Article 14 specifically obligates signatory states to protect and preserve basic human rights, including the right to a fair trial.⁴⁵ Article 14 outlines the due process guarantees, which require an individual to be promptly informed of the detailed nature and cause of the charge against her, to be tried in her presence, to defend herself, and to examine the witnesses against her.⁴⁶ Article 14(1) guarantees that all individuals shall be equal before courts and tribunals, and that everyone is entitled to a fair and public hearing by a competent, independent, and impartial court or tribunal established by law.⁴⁷ Article 14(3)(a) protects the right to be informed promptly and in detail of the nature and cause of the charge against her in a language which she understands.⁴⁸ Article 14(3)(c) of the ICCPR protects the

43. See *FAQ: ICCPR*, *supra* note 12. See generally David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183 (1993) (comparing the ICCPR to less rapidly accepted treaties, such as the Genocide and Torture Conventions, which were not ratified until Congress passed certain legislation).

44. See U.N. High Comm'r for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, U.N. Doc. HR/PUB/10/2 (2010) (proclaiming that States are responsible for their own failures to prevent or prosecute the commission of a human rights violation).

45. See ICCPR, *supra* note 11, at 14 (noting that these rights include the right to life and human dignity; equality before the law; freedom of speech, assembly, and association; religious freedom and privacy; freedom from torture, ill-treatment, and arbitrary detention; gender equality; the right to a fair trial, and; minority rights).

46. *Id.*

47. *Id.* art. 14(1).

48. *Id.* art. 14(3)(a).

right to be tried without undue delay.⁴⁹

When an issue is raised regarding a State's violation of Article 14 obligations, one of the first rebuttals is a justification under the Article 4(1) derogation provision.⁵⁰ Article 4(1) of the ICCPR allows a state to derogate from standard ICCPR obligations during national emergencies, which endanger the life of the nation, but to the extent that is "strictly required by the exigencies of the situation."⁵¹ Three of the necessary standards for a valid derogation under the ICCPR are the existence of a state of emergency that threatens the life of the nation, the principle of proportionality, and proclamation and notification of the emergency.⁵² The existence of a public emergency that threatens the life of the nation is not specifically defined in the ICCPR, but the Human Rights Convention gives an interpretation, clarifying that not every disaster or disorder qualifies as a public emergency which threatens the life of the nation.⁵³ Scholars have theorized that a terrorism threat does not necessarily have to threaten the life of a nation in the context of derogation.⁵⁴ The requirement of

49. *Id.* art. 14(3)(c).

50. *Id.* art. 4(1).

51. *See id.* *See generally* Andrea Bianchi, *Fear's Legal Dimension: Counterterrorism and Human Rights*, in *INTERNATIONAL LAW AND THE QUEST FOR ITS IMPLEMENTATION: LIBER AMICORUM* 175, 180 (Laurence Boisson de Chazournes & Marcelo Kohen eds., 2010) (noting that the EU has a law similar to the Material Support Bar, which combats terrorism and has a wide breadth of interpretation for its definition of participation in a terrorist group).

52. *See* Tahmina Karimova, *Derogation from Human Rights Treaties in Situations of Emergency*, *GENEVA ACAD. OF INT'L HUMANITARIAN L. AND HUM. RTS.*, http://www.geneva-academy.ch/RULAC/derogation_from_human_rights_treaties_in_situations_of_emergency.php (last visited Apr. 11, 2016) (concluding that the other relevant factors for derogating are the principle of consistency, non-derogable rights, and the prohibition of discrimination).

53. *See id.*; *see also* MANFRED NOWAK, *U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY* 90 (N.P. Engel Verlag ed., 2d ed. 2005) (suggesting that civil war and other serious violent internal incidents of unrest are the most commonly asserted reasons for declaring a public emergency which threatens the life of the nation).

54. *See* DUFFY, *supra* note 15, at 585 (stating that the United Kingdom's domestic courts found that its government's derogation after the September 11th terrorist attacks were proper, but noting the dissent's strong disagreement); *see also* *A v. Sec'y of State for the Home Dep't*, [2004] UKHL 56, [95]-[96], (appeal taken from Eng.) (opining that terrorism does not threaten government institutions nor the existence of a civil community, which is the true life of the nation).

proportionality limits the emergency powers by strictly evaluating severity, duration, and geographic scope.⁵⁵ The derogation must be of an “exceptional and temporary nature,” and the substance of the derogation should be a restriction of a specific right, not a circumvention on human rights.⁵⁶

Both a request to the United Nations and a domestic proclamation of emergency must be made in order to properly derogate from ICCPR obligations.⁵⁷ The requirements of proclamation and notification are an essential technical prerequisite for the application of derogation as a safeguard against arbitrary use of derogation.⁵⁸ A state’s duty to proclaim a state of emergency prevents arbitrary derogation and illegitimate after-the-fact justification for violations of guaranteed rights,⁵⁹ while a state’s duty to notify is a guarantee for supervision by the United Nations of the legality of the alleged state of emergency.⁶⁰ The United States has proclaimed a state of emergency multiple times, but has never notified the United Nations of any state of emergency.⁶¹

55. See General Comment 29, *supra* note 41, para. 2 (averring that the obligation to limit derogations to those strictly required by the exigencies of the situation fulfills the proportionality requirement).

56. See Martin Scheinin & Mathias Vermeulen, *Unilateral Exceptions to International Law: Systematic Legal Analysis and Critique that Seek to Deny or Reduce the Applicability of Human Rights Norms in the Fight Against Terrorism*, reprinted, in *TERRORISM AND HUMAN RIGHTS* 20, 45 (Martin Scheinin & Sarah Joseph eds., 2013) (defining the Human Rights Committee’s view on the ICCPR Article 4(1) derogation provision, and noting that this view is codified in U.N. HRC General Comment 29).

57. See *supra* note 52 (proclaiming that the HRC adopted an approach of declining to recognize the legitimacy of particular invasions of protected rights in the absence of submissions of justification in fact or law to validate such derogation).

58. See *id.*; see also Diane A. Desierto, *NECESSITY AND NATIONAL EMERGENCY CLAUSES: SOVEREIGNTY IN MODERN TREATY INTERPRETATION* 242-43 (Martinus Nijhoff ed., 2012) (noting that Article 4 of the ICCPR has many substantive and procedural safeguards to prevent indiscriminate invocation of a public state of emergency); see also ICCPR, *supra* note 11, art. 4.

59. See Joan F. Hartman, *Derogations from Human Rights Treaties in Public Emergencies*, 22 *HARV. INT’L L.J.* 1, 2 (1981) (arguing that it is difficult to find a balance between the protection of a nation in crisis and protection of individual rights).

60. See ICCPR, *supra* note 11, art. 4(3).

61. See *infra* Part III.B.2.

C. FRAMEWORK OF THE MATERIAL SUPPORT BAR

The United States is the largest recipient in the world of asylum claims,⁶² receiving 41,920 asylum applications in 2014.⁶³ Of those applications, 8,775 were granted,⁶⁴ but 2,473 cases were put on hold for terrorism related inadmissibility grounds, one of which is the Material Support Bar.⁶⁵

When applying for Lawful Permanent Resident (“LPR”) status or United States citizenship (“USC”), the Department of Homeland Security (“DHS”) conducts a background search of each asylee.⁶⁶ This process also applies to individuals who are seeking asylum-status but are not yet in the United States.⁶⁷ The DHS officer then determines whether an action or actions by the asylum seeker constitutes material support, and her application is either denied or put on hold.⁶⁸

The Material Support Bar statute provides a non-exhaustive list of actions that constitute material support, including monetary donations, provision of weaponry, assistance in training, and any other forms of assistance to a terrorist organization.⁶⁹ However,

62. See generally Arenilla, *supra* note 10 (analyzing the UNHCR Asylum Trends from 2012).

63. *Asylum Statistics FY 2010-2014*, DOJ (Mar. 2015) <https://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/03/16/fy2010-fy2014-asylum-statistics-by-nationality.pdf>.

64. *Id.*

65. USCIS TRIG NGO MEETING AS OF SEPTEMBER 30, 2014, AILA InfoNet Doc. No. 14120106. (posted Dec. 1, 2014).

66. See DENIAL AND DELAY, *supra* note 16, at 4 (explaining the legal process of gaining asylum status).

67. *Frequently Asked Questions: What is the Difference Between an Asylum Seeker, a Refugee and an Asylee?*, HIAS, <http://www.hias.org/hias-what-difference-between-asylum-seeker-refugee-and-asylee/> (last visited Apr. 11, 2016) (defining an asylum seeker as an individual who has fled persecution in her home country and is seeking safe haven in a different country, but, has not yet received any legal status. Defining Asylee as the individual who has also fled persecution in a different country, but has since been granted legal status by the government).

68. See INA, *supra* note 5 (stating that “an alien whose entry or proposed activities in the United States the Secretary of State has reasonable grounds to believe could have serious adverse foreign policy effects for the United States is inadmissible”); Schusheim, *supra* note 9, at 470 (indicating that DHS reported that 512 asylum cases were on hold because of the material support issue in 2006).

69. See INA, *supra* note 5 (forbidding the provision of a safe house,

because the statute does not provide a concrete definition of “material support,” courts have interpreted the definition even more broadly.⁷⁰ The Board of Immigration Appeals (“BIA”) and the United States Court of Appeals for the Third Circuit (“Third Circuit”) have expanded the statute’s interpretation of material support to include tangential actions, such as setting up tents at a church event.⁷¹

In 2007, DHS introduced waivers as a supplemental mechanism to the Material Support Bar application process in an attempt to address the initial impact of the broad provisions.⁷² However, the statutory changes only affected small categories of refugees and further broadened the discretionary authority of DHS by allowing it to grant these waivers.⁷³ These waivers apply to groups of asylum seekers who contributed to terrorism in some form under duress, or to groups

transportation, communication, financial funds, false identification, weapons, explosives, or training); *see also* Craig R. Novak, *Material Support to Terrorists or Terrorist Organizations: Asylum Seekers Walking the Relief Tightrope*, 4 MOD. AM. 19, 20 (2008) (stating that the REAL ID Act breaks down the Material Support Bar into three elements: mens rea, material support provided, and that support was given to a terrorist organization). *See generally* REAL ID Act, *supra* note 8.

70. *See generally* Schusheim, *supra* note 9, at 472 (noting that while some courts and government entities have broadened their reading of material support, many human rights groups, like Human Rights First, Amnesty International, and Refugee Council USA, have campaigned for a narrower definition of material support).

71. *See id.* at 477 (asserting that between the BIA’s suggestion that material support was meant to cover virtually all forms of assistance, and the Third Circuit’s holding of handing out food as material support, mere support has replaced material support).

72. *See* Schulman, *supra* note 10, at 953-54 (asserting that DHS has interpreted its waiver authority to require it to subject any waiver applications to two levels of review; DHS also reserves the right to review any case at headquarters resulting in an unworkable bottleneck and statutory interpretations that may be entirely unreviewable by federal courts). *But see* Schusheim, *supra* note 9, at 481 (opining that the Secretary’s policy rationale for the waivers seemed to have more to do with limiting the number of refugees than national security concerns).

73. *See* DENIAL AND DELAY, *supra* note 16, at 2; Schusheim, *supra* note 9, at 471 (arguing that while at first glance the waivers appear to be a step in the right direction in terms of refugee rights, the waivers provide such a slender read for refugees that it was estimated that the waiver would only apply to ten in 7,000 cases).

that the United States now recognizes as a non-threat.⁷⁴ However, waivers have not been formed for other asylum seekers, such as individuals who contribute to organizations that the United States recognizes as legitimate representatives of another country's individuals.⁷⁵ Additionally, the duress exception is difficult to obtain under the court's current interpretation.⁷⁶

The Material Support Bar can be triggered through multiple relationships between the asylum seeker and the terrorist activity.⁷⁷ One of these relationships is the provider-recipient relationship.⁷⁸ The provider-recipient relationship covers three categories of interaction: (1) support that may have helped further the commission of a terrorist activity;⁷⁹ (2) past contributions to an individual who the asylum seeker reasonably should know has committed or plans to be linked to terrorist activity;⁸⁰ and (3) a sweeping category, which covers any support given to a terrorist organization, defined broadly as "a group of two or more individuals, whether organized or not, which engages in [terrorist] activity."⁸¹

74. See Schusheim, *supra* note 9, at 480-86; see also *In re S- K- 23 I & N Dec. 936* (BIA 2006) (recognizing the Chin National Front (CNF) as a non-threat after being previously characterized as a threat).

75. See *id.* (denying asylum to a woman who donated \$1,000 and a pair of binoculars to a member of the CNF, even though it was widely accepted that the CNF was fighting against the terrorist activity of the Burmese Government. When the United States did place the CNF on the waiver list, it still took the woman two years to achieve asylum).

76. See *Sesay v. Attorney Gen. of U.S.*, 787 F.3d 215, 222 (3d Cir. 2015) (holding that involuntary material support, even when given under the threat of death, bars an individual from receiving asylum); see generally *id.* (affirming the Board of Immigration Appeals' holding that a citizen of Sierra Leone, who was forced into an abusive labor position of a rebel group, qualified as material support to a terrorist organization).

77. See Schulman, *supra* note 10; Schusheim, *supra* note 9.

78. See Schusheim, *supra* note 9, at 477 (concluding that the provider-recipient relationship is just one compelling example of the many paths leading into the maze that is the Material Support Bar).

79. See *id.* at 477 (noting that this type of support includes monetary, domestic, religious, or emotional support, regardless of how minute the assistance may be).

80. See *id.* at 477-78 (maintaining that if an asylum seeker had unwittingly contributed to a group in the past that later became involved in terrorist activity, she would still be grouped into this category).

81. See *id.* at 478 (stating that this category's definition is so broad that it

The United States has an obligation to ensure its immigration policies and laws, including the Material Support Bar, comply with its ICCPR obligations, and the United States has failed to do so. The Material Support Bar is interpreted too literally, allowing information to be withheld from asylum seekers, and causing undue delay in the processing of LPR status and USC.⁸²

III. ANALYSIS

The Material Support Bar has a valid purpose in preventing the granting of asylum seeker status to individuals with significant ties to terrorist activities, but its current application is violating the international obligations of the United States.⁸³ Specifically, the current application of the Material Support Bar violates Article 14 of the ICCPR,⁸⁴ which obligates all states to provide asylum seekers with due process. The Material Support Bar is interpreted too literally, allows information to be withheld from asylum seekers, and causes undue delay in the processing of LPR status and USC.⁸⁵

Even if the United States attempted to justify its application of the Material Support Bar under the Article 4(1) derogation provision, it would not succeed because the Material Support Bar is not proportional to the alleged U.S. state of emergency, and because the United States failed to notify the United Nations of its state of emergency.⁸⁶

would include members of the United States military stationed in Iraq).

82. See discussion, *infra* Part III.

83. See Jordan Fischer, *The United States and the Material-Support Bar for Refugees: A Tenuous Balance Between National Security and Basic Human Rights*, 5 DREXEL L. REV. 237, 258 (2012-2013) (alleging that by failing to address this distinction, the United States is not accurately complying with Article 33(2) of the 1951 Convention on the Status of Refugees, and therefore is not complying with its international obligations); see also *id.* at 259 (confirming that Special Rapporteurs have encouraged the UN to urge states to more accurately comply with international law when implementing a Material Support Bar for asylum seekers).

84. *Id.*

85. See ICCPR, *supra* note 11, art. 14(1); see also *id.* art. 14(3)(a); *id.* art. 14(3)(c).

86. See *id.* art. 4(1).

A. THE MATERIAL SUPPORT BAR VIOLATES ARTICLE 14 OF THE ICCPR BECAUSE IT IS INTERPRETED TOO LITERALLY, WITHHOLDS INFORMATION FROM ASYLUM SEEKERS, AND CAUSES UNDUE DELAY.

1. Overbroad statutory language and overly literal interpretation violates Article 14(1)

As it is currently applied, the Material Support Bar violates Article 14(1) of the ICCPR because DHS, BIA, and the courts are interpreting it too broadly.⁸⁷ Article 14(1) of the ICCPR states that everyone shall be entitled to a fair and public trial by a competent, independent, and impartial court, but the Material Support Bar's statutory language provides a disservice to asylum seekers, many of whom are actually victims of terrorism, yet are treated as terrorists.⁸⁸ Additionally, the U.N. Human Rights Council ("HRC") has stated that the right to an independent and impartial tribunal is an absolute right, and that no circumstances can justify derogating from the central principles of a fair trial, including the presumption of innocence.⁸⁹

The current application of the Material Support Bar violates the right to a fair trial because courts have consistently interpreted the Material Support Bar so broadly that the court becomes partial in its

87. See Schulman, *supra* note 10, at 951 (considering how DHS and the BIA have interpreted the statute broadly to encompass asylum seekers who have been victimized by or had merely incidental contact with terrorist organization members); DENIAL AND DELAY, *supra* note 16, at 3 (contending that the current definition of terrorist activity is so broad that it bars individuals who are not only not threats to U.S. security, but are also not guilty of any criminal wrongdoing). See generally *supra* note 17 (clarifying that neither the statutory language nor the legislative history of the waiver provision of the Material Support Bar provides any indication that Congress' intent was to exempt the BIA or federal courts from their obligation to interpret the Material Support Bar in conformity with U.S. international treaty obligations).

88. See Schulman, *supra* note 10, at 953 (stating that the limited legislative history for DHS interpretation of the Material Support Bar has lost all connection between the intent of the legislation and actual threats to national security); Schusheim, *supra* note 9. See generally ICCPR, *supra* note 11, art. 14(1).

89. See DUFFY, *supra* note 15, at 518 (noting that some fundamental guarantees of fair trial, such as the presumption of innocence, are most likely to be considered a sine qua non of fair trial, and thus remain applicable at all times, even times of national emergency).

decision making during the asylum-seeking process.⁹⁰ Additionally, the court opinions appear to be driven by political motives to keep refugees out, as opposed to analyzing each case based on evidence.⁹¹

The overly literal interpretations of the excessively broad statutory language of the Material Support Bar has been discussed in very limited jurisprudence.⁹² This has created a trend in which DHS attorneys and immigration judges accept and advance the overly literal interpretations that the BIA has formulated.⁹³ Because all of these individuals simply cite to this literal interpretation without providing due analysis of their own, it is no longer possible for courts to make independent decisions, thereby violating Article 14(1).⁹⁴

90. See Schusheim, *supra* note 9. See e.g., Fischer, *supra* note 84, at 258 (stating that the United States is also violating the 1951 Convention on Refugees by not distinguishing between individuals who pose real threats to national security and individuals who unwittingly aid in terrorist activities); *Comprehensive Immigration Reform: Faith Based Perspectives: Hearing on S. 395 Before Subcommittee on Immigration, Refugees & Border Security of the Senate Committee on the Judiciary*, 111th Cong. 10-12 (2009) (statement of Theodore McCarrick, Cardinal Archbishop Emeritus, Diocese of Washington, Washington D.C.) (finding that the definitions of terrorist activity and what constitutes material support in the INA were written so broadly and applied so expansively that thousands of refugees are being improperly labeled as a threat to national security); see also Schusheim, *supra* note 9, at 474 (asserting that the BIA and immigration courts have been reluctant to interpret the Material Support Bar and “material support” beyond its broad statutory definition, leaving minimal jurisprudence in the statutory language’s interpretation).

91. See Schusheim, *supra* note 9 (maintaining that courts have sided with the terrorism-political debate driving the material support ground and have not been inclined to consider international law on refugee rights); Special Rapporteur on the Promotion and Protection of Human Rights and the Fundamental Freedoms While Countering Terrorism, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 41, U.N. Doc. A/HRC/6/17/Add.3 (Nov. 22, 2007) (cautioning against material support laws, which are expressed in terms that are not exclusive, thereby rendering the term “material support” extremely vague).

92. See Schulman, *supra* 10, at 954 (indicating that *In re S—K—* is one of the only published BIA opinions that discusses the Material Support Bar, and, therefore, its upholding of a strict and literal interpretation of the statutory language has become the most commonly applied interpretation of the Material Support Bar); *supra* note 75.

93. See Schulman, *supra* 10.

94. See Linda Kelly Hill, *Holding the Due Process Line for Asylum*, 36 HOFSTRA. L. REV. 85, 104 (2007) (asserting that some immigration opinions

2. *Withholding of information from asylum seekers violates Article 14(3)(a).*

Article 14(3)(a) states that all individuals within a state's jurisdiction are to be informed promptly and in detail of the nature and cause of the charge against them in a language which they understand.⁹⁵ Contrary to this obligation, the U.S. government withholds information from asylum seekers regarding the status of their cases, thereby violating Article 14(3)(a).⁹⁶ While most asylees are aware that their applications for LPR status or USC are on hold because of the Material Support Bar, they are not informed on the specific grounds for which they are being barred.⁹⁷ Furthermore, in some situations, information is denied to asylum seekers while they are in immigration detention awaiting trial, often for years at a time.⁹⁸

completely lack reason to a point that they are “literally incomprehensible”). *See e.g.*, *Banks v. Gonzales*, 453 F.3d 449, 452-53 (7th Cir. 2006) (finding the immigration judge's view of the evidence “hard to fathom”); *Gjerazi v. Gonzales*, 435 F.3d 800, 813 (7th Cir. 2006) (noting that the immigration judge's conclusions are not supported by substantial evidence that could be found in the record); *Elzour v. Ashcroft*, 378 F.3d 1143, 1154 (10th Cir. 2004) (asserting that the immigration judge's reasoning fell short of his obligation to “provide a foundation” for his reasoning); *Cao He Lin v. U.S. Dep't of Justice*, 428 F.3d 391, 406 (2d Cir. 2005) (alleging that the immigration judge relied on speculation, failed to consider all of the significant evidence, and placed an undue reliance on the fact that the asylum seeker's documents were not authenticated); *Chen Yun Gao v. Ashcroft*, 299 F.3d 266, 279 (3d Cir. 2002) (stating that the immigration judge's conclusion were unsupported).

95. *See* ICCPR, *supra* note 11, art. 14(3)(a).

96. *See* Hughes, *supra* note 16, at 63 (confirming that many asylum seekers and refugees are unaware that their applications for permanent residence are on hold based on the “terrorism”-related provisions of immigration law). *See also* U.N. Human Rights Comm., General Comment 13, art. 14 (Twenty-first session, 1984), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 5 (1994) (explaining that while the specific elements of article 14(3) are “minimum guarantees,” simply observing these guarantees is not necessarily sufficient to ensure the fairness of a hearing).

97. DENIAL AND DELAY, *supra* note 16, at 63 (describing a refugee admitted to the U.S. who waited three years for permanent residency without explanation, and received a response ten years later denying his request under INA § 212(a)(3)(B)).”).

98. *See id.* at 62 (using the example of the respondent in the case of *In Re S-K-*, who was imprisoned for two years while waiting for her case to make its way through the appeals process without being told why she was being held in

Lack of communication with asylum seekers in detention while awaiting exemptions from the Material Support Bar in immigration court removal cases also violates Article 14(3)(a) in an especially difficult manner.⁹⁹ After DHS announced it was creating a waiver exemption process to be implemented by Immigration & Customs Enforcement (“ICE”) and U.S. Citizenship & Immigration Services (“USCIS”), it took three years for the exemption process to begin. During those three years, detainees were not given any updates on the status of their waivers or the exemption process.¹⁰⁰ This left many individuals without information on the status of their case for over five years, which is a clear violation of Article 14(3)(a).¹⁰¹

Another example of Article 14(3)(a) violations within the Material Support Bar is the fact that interviews conducted by DHS, which determine whether to grant asylum status, are informal, not recorded, and not transcribed.¹⁰² Termination interviews are also informal. This procedural informality in the termination context may allow for certain adjudicator bias to go unrestrained.¹⁰³ This is especially perilous to asylum seekers, given the fact that DHS asylum termination proceedings and interviews are not subject to immediate judicial or administrative review.¹⁰⁴ Because these proceedings are

detention); DUFFY, *supra* note 15, at 267 (asserting that scholars have voiced general concern for human rights violations regarding the very limited access asylum seekers have to information and evidence against themselves and their pending trials).

99. See DENIAL AND DELAY, *supra* note 16, at 57 (describing situations in which the lack of communication has caused serious problems for refugees awaiting asylum decisions).

100. *See id.*

101. *See id.*

102. See Raz, *supra* note 32, at 1982 (citing *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1120 (9th Cir. 1999) (comparing the informal context of a DHS interview to the formal setting of Immigration Court proceedings)).

103. *See id.* at 1961 (holding that an asylum seeker must seek a stay of removal in order to avoid removal during the review of her case by a circuit court). See generally Trina Realmuto et al., *Seeking a Judicial Stay of Removal in the Court of Appeals: Standard, Implications of ICE’s Return Policy and the OSG’s Misrepresentation to the Supreme Court, and Sample Stay Motion*, NAT’L IMMIGR. PROJECT OF THE NAT’L LAWYERS GUILD (May 25, 2012), http://www.bc.edu/content/dam/files/centers/humanrights/pdf/Seeking_a_Judicial_Stay_of_Removal.pdf (explaining the legal process for stay requests and the DHS interviews within that specific context).

104. *See id.*

informal and unrecorded, there is no record for asylum seekers to refer to while waiting for updates on their legal status, thereby violating their Article 14(3)(c) right to be tried without undue delay.

3. *DHS leaving asylum seekers incognizant of their legal standing violates Article 14(3)(c).*

Article 14(3)(c) of the ICCPR protects the right to be tried without undue delay.¹⁰⁵ Hundreds of asylum requests have been placed on indefinite hold at the U.S. asylum office as a result of the failure of DHS to set up an effective process for refugees to seek an exemption under the Material Support Bar.¹⁰⁶ Extended review time periods result in prolonged separation from families, which can have severe effects on the lives of asylum seekers and their families.¹⁰⁷ The delay in granting legal status to asylum seekers delays their integration, and as a result, asylum seekers are severely limited in their survival in the United States or abroad.¹⁰⁸ The inability to travel and the inability to gain employment, and therefore the inability to maintain residence, purchase food, and support themselves and their families are all results of delayed legal status.¹⁰⁹

Part of the reason for long wait times within the Material Support Bar process is the lack of a present administrative structure.¹¹⁰ For

105. ICCPR, *supra* note 11, art. 14(3)(c).

106. See Eleanor Acer et. al., *Abandoning the Persecuted: Victims of Terrorism and Oppression Barred from Asylum*, HUM. RTS. FIRST (2006), 2 <https://www.humanrightsfirst.org/wp-content/uploads/pdf/06925-asy-abandon-persecuted.pdf> (asserting that this prolonged state of being uncertain of one's immigration status has already lasted several years for some asylum seekers). See generally *supra* note 78.

107. See DENIAL AND DELAY, *supra* note 16, at 60-62 (noting that, for dependents of asylum seekers, being unable to work or to plan for the future for a long period of time makes it very problematic for them to support their families); Acer, *supra* note 106, at 2 (stating that the delay has left many families separated for years, exposing refugee children to more time in difficult and dangerous circumstances abroad).

108. See, e.g., DENIAL AND DELAY, *supra* note 16, at 61 (narrating the stories of asylum seekers whose relatives were harmed by long delays in their immigration processing).

109. See *id.* at 62-63.

110. See Schusheim, *supra* note 9, at 483 (declaring that otherwise eligible asylum seekers waiting in detention facilities on material support grounds will likely struggle to access waivers since there is no clear mechanism available for

example, the absence of a stable mechanism for the waiver process has caused serious problems with long wait times.¹¹¹ It has generally taken asylum seekers at least two years, though typically longer, to receive a final order from the BIA or from an immigration judge, which must be granted before their cases can be considered for a waiver.¹¹² Asylum seekers can then face even further delays, often months, in receiving a decision on that waiver, and once they have been granted a waiver, they then face even further delay as both they and ICE make a motion to the immigration court to reopen their cases in order for them to be granted asylum.¹¹³

B. UNITED STATES IS NOT PROPERLY DEROGATING UNDER ARTICLE 4(1) BECAUSE THE MATERIAL SUPPORT BAR IS NOT PROPORTIONAL TO THE U.S. STATE OF EMERGENCY, AND BECAUSE THE UNITED STATES FAILED TO NOTIFY THE UNITED NATIONS OF ITS STATE OF EMERGENCY.

1. Principle of Proportionality

The U.S. application of the Material Support Bar is not proportional to the alleged U.S. state of emergency because the long-lasting effects of the Material Support Bar do not align with the temporary nature of a terrorism-based state of emergency.¹¹⁴ In other words, the Material Support Bar goes above the maximum

requesting a waiver); *In re S-K-*, 23 I & N. Dec. 936 (B.I.A. 2006) (holding that an asylum seeker, who waited over five years to gain asylum, qualified for a group-based waiver).

111. See Hughes, *supra* note 16, at 56 (emphasizing the long period of time required for LPR status and USC applications to move all the way through the immigration court process and any administrative appeals, at which time the applicant can then be considered for a waiver); *supra* note 78.

112. See DENIAL AND DELAY, *supra* note 16, at 56 (basing the data off of examples of Human Rights First cases).

113. See *id.* at 57 (asserting that this last remand phase alone can result in delays of several months).

114. See DUFFY, *supra* note 15, at 586 (clarifying that emergencies are exceptional and temporary, and the derogating actions stemming from these emergencies should also be exceptional and temporary); Desierto, *supra* note 58, at 254 (setting forth the Human Rights Committee statement in U.N. HRC General Comment 29, which said that the extent strictly required by the exigencies of the situation refers to the subject matter and temporal coverage of the derogation action).

derogation allowed by the conditions imposed by the severity of the U.S. state of emergency¹¹⁵ and therefore, does not provide the protection of the right to a fair trial guaranteed under Article 14 of the ICCPR.¹¹⁶

An ongoing threat of terror, which has lasted fifteen years, is not a legitimate state of emergency for which derogation can apply under the ICCPR.¹¹⁷ The government interest of preventing a terrorist attack must be achieved by narrowly tailored means in order to meet the proportionality test.¹¹⁸ Preventing asylum seekers access to the United States is not a narrowly tailored method of achieving the requirements of repelling the threat of terrorism in the United States.¹¹⁹

115. See generally Acer, *supra* note 106 (detailing the effect of the Material Support Bar on the rights of asylum-seekers).

116. See Desierto, *supra* note 58, at 254 (noting that the maximum derogation strictly allowed by the conditions imposed by the severity of the exceptional state of emergency crisis must still guarantee the protection of human rights); see also *supra* note 56.

117. See General Comment 29, *supra* note 41, at ¶ 3 (proclaiming that even in a period of armed conflict, measures derogating from the ICCPR are allowed only to the extent that the situation constitutes a threat to the life of the nation); *supra* note 52. But see Edsel Hughes, *Entrenched Emergencies And The "War On Terror": Time To Reform The Derogation Procedure In International Law*, 20 N.Y. INT'L L. REV. 1, 3 (2007) [hereinafter Edsel Hughes, *Entrenched Emergencies*] (identifying Northern Ireland, southeast Turkey, and Israel as cases in which a conflict began as a temporary state of emergency but was ongoing for so long that emergency rule became general rule).

118. See DUFFY, *supra* note 15, at 267 (asserting that, with regards to proportionality, the force used must be no more than is necessary to stop the threat presented); Edsel Hughes, *Entrenched Emergencies*, *supra* note 117, at 7 (emphasizing that derogation is acceptable if it is a proportionate response to an imminent threat or danger).

119. See DUFFY, *supra* note 15, at 267-77 (asserting that the proportionality test should be applied vis-à-vis the requirements of stopping the cause of the state of emergency, not measured against the scale of the prior attack or threat). See generally Scott P. Sheeran, *Reconceptualizing States of Emergency Under International Human Rights Law: Theory, Legal Doctrine, and Politics*, 34 MICH. L. REV. 491, 556 (2013) (proposing that instead of fully derogating from rights, states should simply limit them in a state of emergency).

2. Failure to Lodge Request

The United States failed to lodge a request for derogation under Article 4 of the ICCPR, despite having declared a domestic state of emergency after September 11, 2001.¹²⁰ The United States never notified the United Nations of its declaration of a state of emergency, as required by Article 4.¹²¹

Furthermore, President Barack Obama has renewed the declaration of a state of emergency four times during his presidency but has never notified the United Nations of his declaration, which would meet the derogation standards of Article 4.¹²² As a matter of

120. See, e.g., Concluding Observations of the Human Rights Committee on the Second and Third Reports Submit by the United States Under the ICCPR, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1, 18 (Dec. 2006); Scheinin, *supra* note 56, at 23 (confirming that the United States has not resorted to formal mechanisms of derogation under human rights treaties, only other arguments or constructions). *But see* Declaration of a National Emergency, *supra* note 14 (stating that the United States was in a state of emergency immediately following the terrorist attacks of September 11th).

121. See DUFFY, *supra* note 15, at 583 (declaring that the UN is the sole determiner of whether or not a state has notified it of the state of emergency); *id.* at 584 (noting that, since states have long been afforded broad discretion to assess their security situations and whether there is an emergency that threatens the life of their nation, the UN would not have disputed the derogation had the U.S. properly derogated immediately after the terrorist attacks of September 11th). See generally ICCPR, *supra* note 11, art. 4 (“Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations.”).

122. E.g., President Barack Obama, Message to Congress on the Continuation of the National Emergency with Respect to Persons Who Commit, Threaten to Commit, or Support Terrorism, 2015 DAILY COMP. PRES. DOCS. 1 (Sept. 18, 2015) (declaring that the terrorist threat that led to the declaration of a state of emergency on Sept. 14, 2001 is still ongoing, and, therefore, the state of emergency continues, and citing his authority to section 202(d) of the National Emergencies Act, 50 U.S.C. 1622(d)); President Barack Obama, Message to Congress on the Continuation of the National Emergency with Respect to Persons Who Commit, Threaten to Commit, or Support Terrorism, 2014 DAILY COMP. PRES. DOCS. 1 (Sept. 17, 2014); President Barack Obama, Message to Congress on the Continuation of the National Emergency with Respect to Certain Terrorist Attacks, 2013 DAILY COMP. PRES. DOCS. 1 (Sept. 10, 2013); President Barack Obama, Message to Congress on the Continuation of the National Emergency with Respect to Persons Who Commit, Threaten to Commit, or Support Terrorism, 2012 DAILY COMP. PRES. DOCS. 1 (Sept. 11, 2012).

international law, this means that the United States, by not formally seeking to derogate from its ICCPR obligations, is either accepting its full range of human rights obligations, or disregarding all human rights obligations.¹²³

Even if the United States had properly lodged a request for derogation under Article 4 of the ICCPR, the Material Support Bar is not proportional to the alleged state of emergency.¹²⁴

IV. RECOMMENDATIONS

Individuals seeking asylum need to have their right of due process protected at all stages of the immigration process.¹²⁵ There are mechanisms to increase transparency and communication between the United States and asylum seekers to grant due process in such a way that the United States would no longer violate its Article 14 obligations.¹²⁶

A. NARROWLY TAILORED STATUTORY LANGUAGE

Revising the statutory language of the Material Support Bar to have less vague and more narrowly tailored definitions would meet Article 14(1) obligations.¹²⁷ This would not only protect the victims of persecution who seek asylum in the United States but also ensure that the United States no longer mislabels victimized and heroic asylum seekers as terrorists.¹²⁸ More narrowly tailored statutory

123. See DUFFY, *supra* note 15, at 582 (stating that the failure of states to notify the UN of the derogation of rights after the terrorist attacks of September 11th reveals derision for the international legal process).

124. See *supra* notes 115-20.

125. See Nimrod Pitsker, *Due Process for All: Applying Eldridge to Require Appointed Counsel for Asylum Seekers*, 95 CALIF. L. REV. 169, 173 (2013) (arguing that all non-citizens on U.S. territory are entitled to due process protections).

126. See, e.g., DEP'T OF HOMELAND SEC., CITIZENSHIP AND IMMIGRATION SERVS. OMBUDSMAN, RECOMMENDATION REGARDING THE ADJUDICATION OF APPLICATIONS FOR REFUGEE STATUS (April 14, 2010) (recommending various potential changes to the system for adjudicating refugee applications).

127. See ICCPR, *supra* note 11, art. 14(1).

128. See DENIAL AND DELAY, *supra* note 16, at 2 (stating that a more specific law would no longer misidentify as terrorists “medical professionals who treat the wounded, parents who pay ransom to their children’s kidnappers, and refugees who engaged in or supported military action against [oppressive] regimes”).

language would also prevent courts from interpreting the current language in such limited ways and allow courts to make more informed decisions, thereby meeting Article 14(1) obligations to a fair trial.¹²⁹

B. OMBUDSPERSON TO MAINTAIN COMMUNICATION

An Ombudsperson mechanism¹³⁰ to supplement the current application of the Material Support Bar would also meet United States obligations under Article 14(3)(a) of the ICCPR.¹³¹ Currently, there is a USCIS/DHS Ombudsperson who is responsible for making recommendations to improve the administration of immigration benefits by USCIS. However, there should be a Ombudsperson to work specifically with individuals whose cases are affected by the Material Support Bar.¹³² The Material Support Bar Ombudsperson would designate an individual to act as a communicator between the asylum seeker and the United States throughout the process, allowing the status of the asylum seeker's application to be more accessible to her. The Ombudsperson would also provide information to the asylum seeker on the exact charges and results of her Material Support Bar claim. This communication would prevent the erroneous deprivation of rights of asylum seekers, thereby allowing the United

129. See Schulman, *supra* note 10, at 954 (summarizing the restrictive manner in which courts have interpreted the law).

130. This proposed solution for the Material Support Bar would be very similar to the United Nations Security Council reformation of the 1267 Blacklist system. The 1267 Blacklist is a U.N. system for individuals designated by member states as terrorist threats; listed persons are subjected to a series of sanctions, most notably bank account freeze and travel ban, all of which UN member states are obliged to enforce under their own legislation. See generally S.C. Res. 1735, ¶¶ 5-6 (Dec. 22, 2006); S.C. Res. 1904, (Dec. 17, 2009).

131. See Craig Forche & Kent Roach, *Limping Into The Future: The U.N. 1267 Terrorism Listing Process At The Crossroads*, 42 GEO. WASH. INT'L L. REV. 217, 225 (2010) (noting that the role of the Ombudsperson under Security Council Resolution 1904 is to consider requests for removal from the blacklist, and make delisting recommendations to the 1267 committee, with considerations from the designating state, state of nationality, and state of residence); ICCPR, *supra* note 11, art. 14(3)(a) (obligating states to promptly inform accused persons of the "nature and cause of the charge against him.").

132. Maria M. Odom was appointed USCIS Ombudsman in September, 2012. See *CIS Ombudsperson*, DEP'T OF HOMELAND SEC. (Mar. 23, 2016), <http://www.dhs.gov/topic/cis-ombudsman>.

States to meet its due process obligations under Article 14 of the ICCPR.¹³³

Additionally, as a third party, the Ombudsperson would be able to act as a whistleblower if the United States were to violate any rights of the asylum seeker.

C. A STABLE MECHANISM TO EFFECTIVELY GRANT DURESS AND GROUP-BASED WAIVERS TO ASYLUM SEEKERS

A new and stable mechanism to effectively grant duress and group-based waivers to asylum seekers would meet Article 14(3)(c) obligations.¹³⁴ It has been nearly ten years since Congress first effectuated the Executive Branch's power to grant waivers, and yet, there is no published process for requesting a waiver.¹³⁵

One aspect of an effective waiver process could include a more streamlined process for evaluation of each waiver application. Since all applications are eventually reviewed by headquarters,¹³⁶ headquarters could be involved in the application evaluation at the outset, as opposed to its current structure, which requires reviews at multiple levels, and then additionally at headquarters.¹³⁷ Unnecessary reviews of applications would decrease the amount of time between application for the waiver and granting the waiver, thereby decreasing the amount of time asylum seekers are left waiting,

133. See Forche & Roach, *supra* note 132, at 225-26 (describing the framework of the ombudsperson relationship to the blacklist petitioners); *id.* (stating that a petitioner on the blacklist may request delisting, at which point the Ombudsperson conducts research based on the information given to them by the designating state and relevant United Nations bodies, followed by two months of communication and engagement between the Ombudsperson and the petitioner). See also Raz, *supra* note 32, at 1957 (stating that the risk of erroneous deprivation is particularly grave because the judiciary may entertain a claim that DHS erred only after the BIA enters an administratively final order of removal).

134. See ICCPR, *supra* note 11, art. 14(3)(c) (obliges states to ensure that all accused persons are "tried without undue delay").

135. See *Ay v. Holder*, 743 F.3d 317, 320-21 (2d Cir. 2014) (holding that the U.S. Federal Government was not able to find any published process for seeking a waiver for duress exceptions). *But see* *Sesay v. Attorney Gen. of U.S.*, 787 F.3d 215, 222 (3d Cir. 2015) (indicating that multiple requests have been granted through ad hoc submissions to DHS).

136. See, e.g., Schulman, *supra* note 10.

137. See *generally id.* at 953 (describing the general process that DHS follows to review waiver applications).

thereby meeting the U.S. Article 14(3)(c) obligations.¹³⁸

Another aspect of an effective waiver process would include a transparent instruction form, which would be filed with DHS.¹³⁹ The instruction form would clearly state the information that DHS requires to determine whether or not a waiver is valid, using other immigration waiver forms as templates.¹⁴⁰ The instruction form would request information such as the reason for inadmissibility, excuse for inadmissibility, and evidence necessary to prove legitimacy of excuse for inadmissibility.¹⁴¹ A transparent instruction form would expedite the waiver process, reducing the current elongated process of receiving a waiver, and, thereby, meeting Article 14(3)(c) obligations.¹⁴²

V. CONCLUSION

The current approach to denying asylum applications under the Material Support Bar in the United States violates Article 14 of the ICCPR because it limits the United States' international obligations to follow procedural due process in asylum proceedings. The current Syrian refugee crisis requires an efficient and fair asylum-process, for which the United States' current Material Support Bar does not allow. Regardless of how significant a role the United States intends to play in the solution to this crisis, substantial change to the Material Support Bar must be effectuated so that the United States meets its international obligations to grant asylum seekers due process in immigration proceedings, while still protecting its residents from terrorist threat.

138. *Cf. id.* at 953 (describing the current procedure).

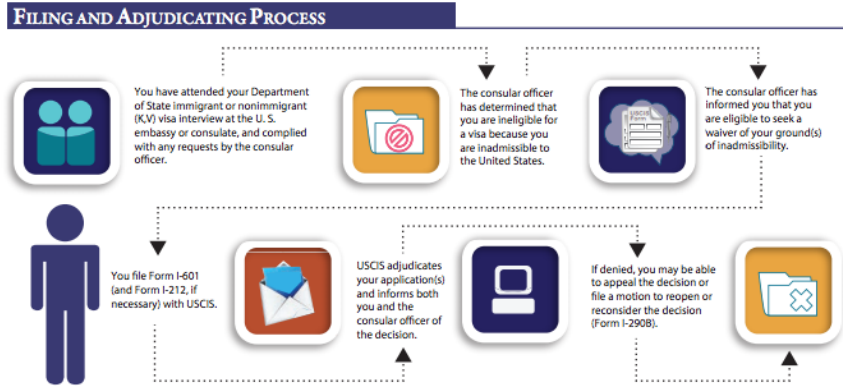
139. *See generally infra* Appendix 1 (presenting the current process of filing and adjudicating inadmissibility waivers to DHS); DENIAL AND DELAY, *supra* note 16.

140. The USCIS I-601 Waiver of Inadmissibility could be used as a boilerplate form for a more transparent waiver exemption form under the Material Support Bar. *See Application for Waiver of Grounds of Inadmissibility: Form I-601*, USCIS (May 22, 2016), <http://www.uscis.gov/sites/default/files/files/form/i-601.pdf>.

141. *See generally id.*

142. *See generally* Schulman, *supra* note 10 (describing the challenges of the lack of transparency in the current waiver review process).

APPENDIX 1¹⁴³



143. *Filing Certain Waivers of Inadmissibility*, USCIS, <http://www.uscis.gov/sites/default/files/files/form/i-601chart.pdf> (last visited Apr. 11, 2016).